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In The Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1567

WILLIAM MICHAEL BRYAN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Director
Division of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAHON, FARLEY & VICKERS
350 East Adams Street
Jacksonville, Florida 32202

Attorneys for Petitioner

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WILLIAM MICHAEL BRYAN,

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LOUIE L. WAINWRIGHT, Director
Division of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit dated April 16, 1975.

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at ..... F2d ..... (Fifth Cir. 1975) and is printed in the Appendix at p. A-26. The opinion of the United States District Court for the Middle District of Florida, is repoted at 377 F. Supp. 766 (M.D. Fla. 1974) and is printed in the Appendix at p. A-19. The opinion of the Supreme Court of Florida is reported at 290 So.2d 482 and is printed in the Appendix at p. A-11. The opinion of the District Court of Appeals of Florida, First District is reported at 280 So.2d 25 (Fla. App. 1973) and is printed in the Appendix at p. A-1.

JURISDICTION

The judgment of the Circuit Court of Appeals, Fifth Circuit, was entered on April 16, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether a defendant in a state court trial is denied his constitutional right to a fair and impartial trial by the giving of an "Allen" charge coupled with placing a time limit on the jury's reaching of a verdict.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arose when the Petitioner was charged by information with the Second Degree Murder of one William Thomas Boes on the 12th day of February, 1972. The case proceeded to trial before the Honorable Warren Nelson, in the Criminal Court of Record in and for Duval County, Florida, on May 9, 1972. This trial ended in a mistrial.

This case was again set for trial, and on June 13th, 1972, the jury returned a verdict of Guilty of Manslaughter.

The basis of the alleged error committed by the trial court was the supplemental instructions given to the jury after they had remained deadlocked for five and one-half (5½) hours. At that time the trial judge brought the jury out, ascertained they were deadlocked, and, over defense counsel's objection, gave them the rather dusty, oft complained of, "Allen" or

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"dynamite" charge, and sent them out for further deliberation.

The trial court then informed counsel that they would wait thirty (30) minutes, and if the jury had not reached a verdict, indicated he would declare a mistrial. Upon the passing of the thirty (30) minutes with no word from the jury, the court again brought the jury out, got one juror's opinion that they were closer to reaching a verdict, then gave them twenty (20) more minutes to reach a verdict, over strenuous defense objection. The actual instruction was as follows:

> "THE COURT: Lodies and Gentlemen of the Jury, do you believe that you can arrive at a verdict in a short period of time?
>
> JUROR: I believe we're closer to it than we were. I have that idea.
>
> THE COURT: If I give you another 20 minutes, will that be enough? You want to give it a try for 20 minutes?
>
> JUROR: All right.
>
> THE COURT: All right. We'll give you another 20 minutes and see if you can arrive at a verdict within the next 20 minutes. You can retire to the jury room."

Seventeen minutes later, the jury returned a verdict of guilty of the lesser included offense of manslaughter.

A Motion for a New Trial was filed, and on June 30th, 1972, said Motion was heard and denied. On July 5th, 1972, Petitioner herein filed his Notice of Appeal, and the jurisdiction of the Florida District Court of Appeal, First District, was invoked.

On July 10th, 1973, the First District Court of Appeal entered its opinion, recorded at 280 So 2d 25, Appendix at p. A-1, reversing the conviction and remanding the case for a new trial, finding coercion in the trial court's instructions.

The State of Florida then petitioned the Florida Supreme Court for a Writ of Certiorari. The Florida Supreme Court granted the Writ and quashed the decision of the First District Court of Appeal and ordered the verdict and judgment reinstated, at 290 So 2d 482, Appendix at p. A-7. Petitioner then petitioned the United States District Court for theMiddle District of Florida, alleging that his rights under the Fifth and Fourteenth Amendments of the Constitution of the United States were violated. The District Court, Hon. Gerald B. Tjoflat presiding, agreed, and granted Petitioner a Writ of Habeas Corpus, reported at 377 F. Supp. 766, Appendix at p. A-11.

The State of Florida appealed to the United States Court of Appeals, Fifth Circuit, and the Fifth Circuit entered its Opinion reversing the District Court and entered the judgment complained of herein. Appendix p. A-19, A-26.

REASONS FOR GRANTING WRIT

Your petitioner would submit the Fifth Circuit erred in its conclusion that the coercive effect of the twenty (20) minute instruction, coupled with the "Allen" charge, was not sufficient to present a constitutional question of due process, and is in conflict with all other circuits on the question.

There are several federal circuit court cases dealing with the question of placing limitations on jury deliberation time. Each of these cases has found impermissible coercion when a time limit is given to the jury by the trial court.

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In the case of *Goff* v. *United States*, 446 F2d 623 (Tenth Cir. 1971), the trial court gave the jury the "Allen" charge approximately six (6) hours after they had deliberated to no avail. This much the Court approved of, but the trial court went farther, and it is stated on p. 626:

> "However, the Court added the following admonishment to the jury: 'If you cannot (reach a verdict) within, oh, we'll say the next hour or so and probably ought to go to lunch first, then we'll have to declare a mistrial and set the case down for hearing again.' Defense counsel objected to all of the supplemental instructions. The jury returned a guilty verdict at 1:25 p.m. It was impermissibly suggestive and coercive for the Court to place a time fuse on the period of jury deliberation. Such constitutes reversible error."

The Tenth Circuit in a previous case had held a time limitation to be coercive, and the *Goff*, supra, court discussed it. In *Burroughs* v. *United States*, 365 F2d 431 (Tenth Cir. 1966) the jury had been deadlocked for some time when the judge told them to try and get organized and work for about another hour. Still deadlocked, the jury was told at 6:25 p.m. that they should deliberate until 7:00 p.m.

The Fourth Circuit has held similarly. In the case of *United States* v. *Lansdown*, 460 F2d 164 (Fourth Cir. 1972) the jury, after some eleven (11) hours of deliberation, reported they were still deadlocked. One juror requested that they be allowed to deliberate for ten more minutes in order to avoid a mistrial. The judge denied the request, and his action was approved on appeal, the Court pointing out that the granting of that request would have placed the jury under a rigid time deadline, which was constitutionally improper.

The Sixth Circuit has also taken the position that trial

courts must not use wording in supplemental instructions that might be coercive, especially after an "Allen" charge has been given. In *Jones* v. *Norvell*, 472 F2d 1185 (Sixth Cir. 1973), cert. den., 411 U.S. 986, the court was reviewing the denial of a State prisoner's petition for a writ of habeas corpus. In that case, the trial court brought the jury out after being told by a court officer that they were deadlocked eleven (11) to one (1), and gave them the "Allen" charge. Thereafter, upon learning that the majority was in favor of a guilty verdict, the judge sent the jury out to see if "you can make any progress. As I told you, it is your duty to decide this case, if you can do so." Five minutes later, a guilty verdict was returned. The Sixth Circuit held at p. 1186:

> "These facts constitute a totality of circumstances which violate the constitutional rights of appellants to a fair and impartial jury trial under the Sixth and Fourteenth Amendments."

The Fifth Circuit in the case at bar has reached exactly the opposite result, and its decision should not be allowed to stand. The opinion in this case distinguishes the above cases concerning time limitations by simply saying that they had their inception in the Federal court system rather than state courts. Federal constitutional rights are applicable in all of our courts, not just in Federal courts. All of the above cases were decided on the constitutional rights of due process and a fair and impartial trial by jury.

Petitioner would submit that the length of deliberation, lateness of the hour, the "Allen" charge and the twenty (20) minute instruction constituted a totality of circumstances that were unconstitutionally coercive, and that simply because it occurred in state court rather than Federal court, should not make any difference.

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CONCLUSION

The Fifth Circuit's Opinion and Judgment are in conflict with other circuit's opinions on the same question, and are at variance with the Federal constitutional rights. For these reasons, the Petition of Writ of Certiorari should be granted.

Respectfully submitted,

MAHON, FARLEY & VICKERS
350 East Adams Street
Jacksonville, Florida 32202

Attorneys for Petitioner

By Joseph S. Farley, Jr.
Joseph S. Farley, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been furnished by United States first class mail on this 12th day of June, 1975, to the following:

Honorable Robert L. Shevin
Attorney General
The Capitol
Tallahassee, Florida 32304

Attorney for Respondent

Joseph S. Farley, Jr.
Attorney

APPENDIX

William Michael BRYAN, Appellant,

v.

STATE of Florida, Appellee.

No. R-351.

District Court of Appeal of Florida,
First District.
July 10, 1973.

Rehearing Denied July 31, 1973.

Lacy Mahon, Jr., of Mahon & Mahon, Jacksonville, for appellant.

Robert L. Shevin, Atty. Gen., and Donald K. Rudser, Asst. Gen., for appellee.

CARROLL, DONALD K., Judge.

The Appellant was tried on a charge of murder in the second degree and convicted of manslaughter, and has appealed from his judgment of conviction and sentence, entered by the Duval County Criminal Court of Record.

The principal question presented for our determination in this appeal is whether that court committed reversible error by giving to the jury an instruction commonly known as the "blockbuster" or "Allen charge."

Historically, the doctrine of the "Allen charge" found its origins in the early decision of the Supreme Judicial Court of Massachusetts in Commonwealth v. Tuey, 8 Cushing 1, 62

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Mass. (1851) and obtained its name from the case of Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). In that case, after the main charge was delivered to the jury, the jury returned to the courtroom apparently for further instructions. These instructions were lengthy and were in substance that in a large proportion of cases absolute certainty could not be expected; that, although the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's argument; that, if the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the hearts of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. The U. S. Supreme Court held that there was no error in the giving of this charge.

On this question, apparently, this court has been more sensitive to the rights of the accused than was the U. S. Supreme Court, at least in 1896, for in Lee v. State, 239 So.2d 136 (Fla.App.1970), we held that the giving of the "Allen" or "blockbuster" charge to the jury constituted error and entitled the defendant to a new trial. The main point raised in that appeal was:

> "Did the court err in giving the so-called 'Allen' or 'Blockbuster' charge to the jury after they had returned to the courtroom following nearly five hours of delib-

eration just before midnight on May 8, 1969, to report failure to agree?"

Among the statements which the court made in his further instructions to the jury in the Lee case were these:

"It is your duty to decide this case if you can conscientiously do so, and you should listen with a disposition to be convinced to each other's arguments.

"If the much larger number of you are for conviction, a dissenting juror should consider whether his doubt was a reasonable one, which made no impression on the minds of so many other men equally honest, equally intelligent with himself. If on the other hand the majority of you are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of their judgment, which is not concurred in by the majority.

"I particularly impress upon you that the verdict which you will render should represent the opinion of each one of you acting individually, yet it by no means follows that opinions may not be changed by conference in the jury room.

"The very object of the jury system is to secure unanimity by a comparison of views and by arguments among yourselves. Each of you should listen with deference to the argument of the others, and with a distrust of your own judgment, if you find that a large majority of the jury taking a different view than the view you take.

"You should not go back into your jury room with a blind determination that the verdict shall represent your opinion of the case at this moment, nor should

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> you close your ears to the arguments of your fellow jurymen who are equally honest, and equally intelligent as yourself."

With reference to the "Allen" or "Blockbuster" charge, this court said in Lee:

> "While it is very proper that jurors should discuss the evidence among themselves in the jury room, and engage in an exchange of ideas, the court should not so interfere with these deliberations with additional instructions which tend to embarrass a single juror in holding to his honest convictions. Some states have now forbidden the use of the charge in question because of the fact, primarily, that it does have a normal tendency to create the impression that the court is directing that a verdict be brought in and that the minority view in the jury room should simply acquiesce in the judgment of the majority, not because the minority juror or jurors have changed their opinion about the evidence, but simply because they are under a mistaken understanding that it is part of their duty to try to comply with the wishes of the courtas expressed in the so called 'Allen or Blockbuster' charge. This also tends to prejudice the defendant's right to a hung jury. Nothing should be said by the trial court to the jury that would or could likely influence the decision of a single juror to abandon his conscientious belief as to the correctness of his position."

In the case at bar, after a juror reported to the court that they were not "very close" to arriving at a verdict, the court further instructed the jury:

> "In a large proportion of cases, absolute certainty can't be expected. Although a verdict must be the verdict

of each individual juror, and not a mere acquiescence in the conclusion of his fellows, each juror should examine the request submitted with candor and fairness and with a proper regard and a deference to the opinion of others. You should listen to each other's arguments and views with an open mind and in a disposition to be convinced. Just as it is your duty to decide the case with a unanimous verdict if you can conscientiously do so, no juror, however, is expected to yield a conscientious conviction he may have upon the evidence. If, however, the majority of your number are for a conviction, a dissenting juror should consider whether his doubt is reasonable when it has made no impression upon the minds of the other jurors, equally honest and equally intelligent. If, on the other hand, the majority of the jury is for an acquittal, a minority should ask themselves whether they might not reasonably doubt the correctness of their judgment, which is not shared by the majority of their fellow jurors. A jury verdict must be a unanimous verdict of all of you, but it must also be the verdict of each of you.

"And I make these suggestions at this time, and we'll give you some more time to see whether or not you can reconcile your differences and see if you can arrive at a unanimous verdict without yielding the conscientious conviction of your own. If you'd retire to the jury room, we'll give it another try for a while. You may now return to the jury room."

In our view, the giving of the above charge in the case at bar was prejudicial to the rights of the appellant, who was entitled to a fair trial, free of pressure upon a minority juror.

Therefore, the judgment appealed from herein must be, and

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it is, reversed and the cause remanded for a new trial in accordance with the views hereinabove set forth.

Reversed and remanded for a new trial.

RAWLS, C. J., and JOHNSON, J., specially concur.

RAWLS, Chief Judge (specially concurs).

I concur in the opinion of the majority but am of the view that the giving of the Allen charge in every instance does not constitute prejudicial error. Therefore, the facts surrounding the giving of the charge must be considered.

In the case at bar, the jury deliberated for five and one-half hours at which time the court stated, "I'm going to bring them out and see how close they are." In response to the question of the trial court at this point, ". . . are you very close to a verdict," a member of the jury responded, "No, sir." A few minutes later the court again brought the jury into the courtroom and the following colloquy took place:

> "THE COURT: Ladies and Gentlemen of the Jury, do you believe that you can arrive at a verdict in a short period of time?
>
> JUROR: I believe we're closer to it than we were. I have that idea.
>
> "THE COURT: If I give you another 20 minutes, will that be enough? You want to give it a try for 20 minutes?
>
> "JUROR: All right.
>
> "THE COURT: All right. We'll give you another 20 minutes and see if you can arrive at a verdict within the next 20 minutes. You can retire to the jury room."

Seventeen minutes after the foregoing period of time dictated by the court, the jury returned its verdict.

It is the foregoing factual situation which persuades me to the view that the Allen charge given under such circumstances constituted prejudicial error.

JOHNSON, J., concurs.

STATE OF Florida, Petitioner,

v.

William Michael BRYAN, Respondent.

No. 44237.

Supreme Court of Florida.
Feb. 20, 1974.
Rehearing Denied April 22, 1974.

Robert L. Shevin, Atty. Gen., and Donald K. Rudser, Asst. Atty. Gen., for petitioner.

Lacy Mahon, Jr., of Mahon & Mahon, and Joseph S. Farley, Jr., Jacksonville, of Mahon & Mahon, for respondent.

DEKLE, Justice.

This cause comes to us on petition for writ of certiorari, asserting direct conflict between the decision below at 280 So.2d 25 (Fla.App.1st 1973), and Lee v. State, 239 So.2d 136 (Fla.App.1st 1970). Conflict exists and we have jurisdiction pursuant to Art. V, § 3(b)(3), Fla.Const., F.S.A.

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Respondent was tried on a charge of 2nd degree murder. Testimony as to some of the critical events occurring at the time of the homicide was directly contradictory. After the jury had deliberated for some five and one-half hours, the court caused them to be returned to see if they were close to reaching a verdict. Upon learning that they were not, the judge delivered an "Allen charge," uring the minority jurors carefully to reconsider their position to see if they could conscientiously agree with thatof the majority of the jury; this was a "balanced" charge, and did not per se benefit either side nor urge any juror to abandon his position and merely accept the will of the majority.[1] The jury then retired to deliberate further. After an additional half hour of deliberation, they were again returned to the court, and were asked whether they were closer to reaching a verdict. It was indicated that

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1. The instruction given in the instant case was:

> "In a large proportion of cases, absolute certainty can't be expected. Although a verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, each juror should examine the request submitted with candor and fairness and with a proper regard and a deference to the opinion of others. You should listen to each other's arguments and views with an open mind and in a disposition to be convinced. Just as it is your duty to decide the case with a unanimous verdict if you can conscientiously do so, no juror, however, is expected to yield a conscientious conviction he may have upon the evidence. If, however, the majority of your number are for a conviction, a dissenting juror should consider whether his doubt is reasonable when it has made no impression upon the minds of the other jurors, equally honest and equally intelligent. If, on the other hand, the majority of the jury is for an acquittal, a minority should ask themselves whether they might not reasonably doubt the correctness of their judgment, which is not shared by the majority of their fellow jurors. A jury verdict must be a unanimous verdict of all of you, but it must also be the verdict of each of you.
>
> "And I make these suggestions at this time, and we'll give you some more time to see whether or not you can reconcile your differences and see if you can arrive at a unanimous verdict without yielding the conscientious conviction of your own. If you'd retire to the jury room, we'll give it another try for a while. You may now return to the jury room."

they were closer to reaching a verdict, and the trial judge allowed them an additional twenty minutes to deliberate. After an additional seventeen minutes ofdeliberation, the jury returned a verdict finding respondent guilty of manslaughter, a lesser included offense. Respondent argues that the giving of the "Allen charge" was error under the circumstances. We do not think so.

[1, 2] The charge as given by the trial court did not differ materially from the approved condensed charge found in Standard Jury Instruction 2.19. Although it is preferable to use the standard instructions where they are appropriate, as Mr. Justice Adkins pointed out in Rigot v. Bucci, 245 So.2d 51 (Fla. 1971), and Standard Instruction 2.19 should be used in such cases as are appropriate henceforth, the charge given in the instant case was not erroneous. It was a balanced charge, urging neither acquittal nor conviction. The trial judge specifically stated that no juror was to abandon his conscientious convictions.

The use of the "Allen charge" has been approved by the U. S. Supreme Court (Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896)), and more recently by the 5th Circuit Court of Appeals (United States v. Bailey, 468 F.2d 652 (C.A. 5, 1972)). It has been implicitly approved in this state in the adoption of Standard Jury Instruction 2.19. We see no reason to disavow its use now. We are urged to disapprove of the use of the "Allen charge" as was done in State v. Marsh, 490 P.2d 491 (Or. 1971); however we note in that case the applicable Oregon law did not require a unanimous verdict in order to convict.

[3] Even assuming arguendo that the trial court committed error in giving this charge, such error was harmless. Although respondent was charged with 2nd degree murder and there

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was no serious doubt that he had committed homicide of some sort, he was not convicted of murder, but of the lesser offense of manslaughter. More importantly, no motion was ever made for a mistrial on this ground, although a previous prosecution for the same acts ended in a mistrial, so that respondent was aware of his choice to move or not. Choices of "tactics" are for the trial lawyer but he becomes bound by the result of the choice he selects. Under the circumstances, any error was harmless.

[4] Respondent also argues that the trial court erred in permitting the jury another twenty minutes deliberation after they had been recalled and had informed the trial judge tha they were closer to reaching a verdict. Again, we must disagree. At no time did the trial judge attempt to coerce the jury into reaching a verdict; nor did he lead them to believe that they *must* reach a verdict. This period merely allowed them an opportunity to reach a verdict after they had informed the trial judge that they were closer to doing so, and they returned voluntarily short of the allotted time. No error appears.

Accordingly, the decision of the First District Court of Appeal is quashed, and the cause remanded for reinstatement of the verdict and judgment.

It is so ordered.

CARLTON, C. J., and ROBERTS, ADKINS and BOYD, J.J., concur.

ERVIN and McCAIN, JJ., dissent.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 74-322-Civ-J-T

WILLIAM MICHAEL BRYAN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Director,
Florida Division of Corrections,

Respondent.

OPINION AND WRIT OF HABEAS CORPUS

On June 30, 1972, petitioner ws sentenced to ten (10) years in prison, following a two-and-one-half-day trial for murder and a conviction for manslaughter rendered on June 13, 1972; petitioner began serving his sentence on June 30, 1972. Petitioner was released on bond on August 10, 1973, after having served approximately thirteen (13) months at the Union Correctional Institution, Raiford, Florida, when the Florida District Court of Appeal for the First District reversed the decision of the Circuit Court, and remanded the case for a new trial. *Bryan v. State*, 280 So. 2d 25 (Fla. App. 1973). The Florida Supreme Court subsequently quashed the decision of the District Court of Appeal and ordered the verdict and judgment reinstated. *State v. Bryan*, 290 So. 2d 482 (Fla. 1974), *rehearing denied*, ... So. 2d. .... (Fla., Apr. 22, 1974). As a result, petitioner was ordered to surrender himself on May 23, 1974. By an Order filed May 23, 1974, this Court

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allowed petitioner to remain free on bail pending a ruling on the petition for habeas corpus filed with this Court on May 16, 1974, pursuant to Title 28, United States Code, Section 2254.

It is clear, at the outset, that petitioner has sufficiently exhausted his available state remedies, since his constitutional claims have been presented to, and ruled upon by, both the District Court of Appeal and the Supreme Court of Florida. The doctrine of exhaustion does not require that he now petition the United States Supreme Court for a writ of certiorari. See *Fay v. Noia*, 372 U.S. 391 (1963). Furthermore, the fact that petitioner is currently free on bail does not preclude this Court from ruling on his petition. *Hensley v. Municipal Court*, 411 U.S. 345 (1973).

Petitioner bases his request for a writ of habeas corpus upon an alleged violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution which resulted when the trial judge coupled an Allen charge, *Allen v. United States*, 164 U.S. 492 (1896), with certain instructions as to how much more time the jury would be allowed to reach a verdict. Petitioner's trial lasted approximately two-and-one-half days. The jury received the case at 3:37 P.M. At approximately 9:07 P.M., after the jury had been deliberating for five-and-one-half hours, the judge returned the jury to the courtroom to determine whether they were close to a verdict. Upon learning that they were not, the judge gave the following Allen charge:

> THE COURT: Be seated there. Let me say this at this time. In a large proportion of cases, absolute certainty can't be expected. Although a verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, each

juror should examine the request submitted with candor and fairness and with a proper regard and a deference to the opinion of others. You should listen to each other's arguments and views with an open mind and in a disposition to be convinced. Just as it is your duty to decide this case with a unanimous verdict if you can conscientiously do so, no juror, however, is expected to yield a conscientious conviction he may have upon the evidence. If, however, the majority of your number are for a conviction, a dissenting juror should consider whether his doubt is reasonable when it has made no impression upon the minds of the other jurors, equally honest and equally intelligent. If, on the other hand, the majority of the jury is for an acquittal, a minority should ask themselves whether they might not reasonably doubt the correctness of their judgment, which is not shared by the majority of their fellow jurors. A jury verdict must be a unanimous verdict of all of you, but it also must be the verdict of each of you.

And I make these suggestions at this time, and we'll give you some more time to see whether or not you can reconcile your differences and see if you can arrive at a unanimous verdict without yielding the conscientious conviction of your own. If you'd return to the jury room, we'll give it another try for a while. You may now return to the jury room. (Transcript at 462-64.)

After the jury had again retired to deliberate, the judge advised counsel that he would call the jury back at 9:37 P.M., saying "[t]hat will be six hours and if they can't arrive at a verdict in six hours, I don't think they ever will." (Transcript

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at 465.) At 9:37 P.M., the judge did call the jury back, whereupon the following discussion took place:

> THE COURT: Ladies and Gentlemen of the Jury, do you believe that you can arrive at a verdict in a short period of time?
>
> JUROR: I believe we're closer to it than we were. I have that idea.
>
> THE COURT: If I give you another 20 minutes, will that be enough? You want to give it a try for 20 minutes?
>
> JUROR: All right.
>
> THE COURT: All right. We'll give you another 20 minutes and see if you can arrive at a verdict within the next 20 minutes. You can retire to the jury room. (Transcript at 466.)

At 9:54 P.M., the jury returned with a unanimous verdict, finding the petitioner guilty of manslaughter.

Objections were made to both the Allen charge and the "20 minute" language, and were overruled. Similarly, motions for a new trial on these grounds were denied. On appeal, the District Court of Appeal ruled that the Allen charge itself violated petitioner's right to a "fair trial, free of pressure upon a minority juror." 280 So.2d at 27. The three-judge panel reversed the decision and remanded the case for a new trial. Two of the judges filed a concurring opinion stating that, while the Allen charge was not impermissible per se, in this case the charge, coupled with the "20 minute" instruction, constituted prejudicial error.

The State then petitioned the Florida Supreme Court for a writ of certiorari. That Court granted the writ, quashed the

decision of the District Court of Appeal and ordered the verdict and judgment reinstated, finding that neither the Allen charge nor the "20 minute" instruction constituted prejudicial error. Subsequently, on April 24, 1974, petitioner's request for a rehearing was denied by that court.

The question before this Court is whether the totality of the circumstances surrounding the eventual guilty verdict in this case indicates that the instructions given by the judge had a coercive effect upon the jury, so to deprive petitioner of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. It is the opinion of this Court that under the circumstances present petitioner's constitutional rights were abridged. A coercive atmosphere was created in which the jury was forced to deliberate to verdict. The jury had deliberated for five-and-one-half hours without reaching a verdict when the judge delivered the Allen charge. Thirty minutes later, they had still not arrived at a verdict. The judge then informed them that he would give them twenty more minutes, and seventeen minutes later the jury returned a verdict finding petitioner guilty of manslaughter. It is at least a fair inference that had the judge either informed the jury that they would be discharged if they could not reach a verdict, or not told them that they could have only twenty minutes more to decide, the jury would have remained deadlocked. Furthermore, the fact that these events took place at nine o'clock at night, after a two-and-one-half-day trial, cannot be ignored. That the members of the jury would be eager to conclude their deliberations and return to their homes is patent.

This Court is cognizant of the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Bailey*, 468 F.2d 652 (5th Cir. 1972), *aff'd en banc*, 480 F.2d

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518 (5th Cir. 1973), upholding the Allen charge. However, the court, in the panel opinion, was quick to point out that while the Allen charge was not impermissible per se, it might "be found coercive under all particular circumstances of a given case." 468 F.2d at 664. It is also true that in *Bailey*, the court, while finding appellant's contentions persuasive, held that "the lateness of the hour, the inclemency of the weather, the danger of travel on the roads, and the fact that it was a Friday evening and that many jurors were women," *id.*, did not suffice, as a matter of law, to render the Allen charge coercive. The court felt that its earlier decision in *United States v. Betancourt*, 427 F.2d 851 (5th Cir. 1970), was controlling on this point. In *Betancourt*, the trial had begun at 9:00 A.M. At 6:13 P.M., the case went to the jury, and at 8:19 P.M. the jury reported that it was deadlocked. Thereupon, the judge gave the Allen charge, and at 10:23 P.M. the jury returned a guilty verdict. While the court of appeals indicated that it might have been wiser for the judge to have recessed at 6:13 P.M. until the next morning, it held that this did not constitute coercion of the jury as a matter of law.

While, of course, this Court is constrained to follow the decisions of the United States Court of Appeals for the Fifth Circuit, it is this Court's opinion that he facts in this case present a substantially greater potential for coercion than did the facts recited in either *Betancourt* or *Bailey*. The chief distinguishing feature is the added instruction by the judge in this case to the effect that the jury would have twenty more minutes to arrive at a verdict, given at 9:37 P.M., after the jury had twice indicated that it was unable to reach a unanimous decision.

In the only analogous reported cases, the courts have found

a coercive effect as a result of the trial judge's instructions. In *Burroughs v. United States*, 365 F.2d 431 (10th Cir. 1966), the jury reported after one hour and twenty minutes that it was deadlocked. This was at 6:25 P.M. The judge proceeded to give the Allen charge, and then told the jury that if they could not reach a verdict by 7:00 P.M. they would recess until the following morning when deliberations would contitnue. The United States Court of Appeals for the Tenth Circuit found such an instruction to be impermissible because of its coercive effect on the jury. The court said:

> But, in any event, it is one thing to recall the jury to beseech them to reason together, and it is quite another to entreat them to strive toward a verdict by a certain time. When these admonitions are considered in their context, they are subject to the clear inference that the judge was unduly anxious to conclude the lawsuit, and we think it entirely reasonable to infer that the jury was aware of this anxiety. This type of verdict-urging on the part of the court tends to undermine the proper function of the common law jury system as contemplated by the Seventh Amendment. We must guard against any such subtle inroads. We think the charge in this case went beyond the permissible limits of the Allen charge as it has been construed and approved by this court. *Id.* at 434.

The Tenth Circuit reaffirmed the position espoused in *Burroughs* in *Goff v. United States*, 446 F.2d 623 (10th Cir. 1971). In *Goff*, the jury had deliberated for approximately six hours over a three-day period when it reported that it was unable to reach a decision. The judge gave the Allen charge, coupled with the instruction: " 'If you cannot (reach a verdict) within, oh, we'll say the next hour or so and probably ought to go to lunch first, then, we'll have to declare a mistrial and set the

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case down for hearing again.'" *Id.* at 626. To this instruction, the Tenth Circuit responded "[i]t was impermissibly suggestive and coercive for the Court to place a time fuse on the period of jury deliberation. Such constitutes reversible error." *Id.* Similar sentiments have been expressed in *United States v. Harris*, 391 F.2d 348 (6th Cir. 1968); and *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972). Respondent has cited no cases expressing contrary notions.

This Court concludes, therefore, that as a matter of law the giving of the Allen charge, coupled with the subsequent twenty minutes deadline instruction, had a coercive effect on the jury, and thus acted to deprive petitioner of his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. It is, accordingly,

ORDERED that:

1. The Petition for Writ of Habeas Corpus, filed herein on May 16, 1974, is granted.

2. Petitioner, William Michael Bryan, is granted this Writ of Habeas Corpus.

3. The judgment and sentence of petitioner, William Michael Bryan, in Case No. 72-95 in the Criminal Court of Record, Duval County, Florida, rendered on June 30, 1972, is vacated and set aside.

4. The State of Florida shall have 120 days from the date of this Order in which to retry the petitioner or dismiss its case against him.

5. Petitioner shall remain free on his present bond pending the State's decision whether to institute further proceedings.

6. The United States Marshall for the Middle District of Florida, or his authorized representative, is directed to serve a copy of this Opinion and Writ of Habeas Corpus on Louie L. Wainwright, Director, Florida Division of Corrections, Farris Bryant Building, Tallahassee, Florida; and on William Michael Bryan, 7424 Laura Street, Jacksonville, Florida.

DONE and ORDERED at Jacksonville, Florida this 20th day of June, 1974.

/s/ GERALD BARD TJOFLAT

UNITED STATES DISTRICT JUDGE

Copies:

Joseph S. Farley, Jr., Esquire
Donald K. Rudser, Esquire
United States Marshal (3)

William Michael BRYAN,
Petitioner-Appellee,

v.

Louie L. WAINWRIGHT, Director,
Division of Corrections,
Respondent-Appellant.

No. 74-3179.

United States Court of Appeals,
Fifth Circuit.

April 16, 1975.

BLEED THROUGH

Appeal from the United States District Court for the Middle District of Florida.

Before GOLDBERG and RONEY, Circuit Judges, and LYNNE, District Judge.

PER CURIAM:

The district court ordered release or retrial of a state prisoner on the ground that the jury which convicted him of manslaughter was unconstitutionally coerced by the giving of an *Allen* charge and a subsequent twenty minute deadline to "see if you can arrive at a verdict." Bryan v. Wainwright, 377 F.Supp. 766 (M.D.Fla.1974). Deciding that the coercive effect, if any, of the state trial procedure does not reach constitutional proportions, we reverse with instructions to deny the petition for writ of habeas corpus.

The facts are not in issue, only their effect. The district court relied on the state trial record which revealed the following. Petitioner's trial for murder lasted approximately two and one-half days. Testimony as to some of the critical events occurring at the time of the homicide was directly contradictory. The jury received the case at 3:37 p.m. At approximately 9:07 p.m., after the jury had been deliberating for five and one-half hours, the judge returned the jury to the courtroom to determine whether they were close to a verdict. Upon learning that they were not, the judge gave the following supplemental instructions, which is commonly characterized as an *Allen* charge:

> THE COURT: Be seated there. Let me just say this at this time. In a large proportion of cases, absolute certainty can't be expected. Although a verdict must

be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, each juror should examine the request submitted with candor and fairness and with a proper regard and a deference to the opinion of others. You should listen to each other's arguments and views with an open mind and in a disposition to be convinced. Just as it is your duty to decide this case with a unanimous verdict if you can conscientiously do so, no juror, however, is expected to yield a conscientious conviction he may have upon the evidence. If, however, the majority of your number are for a conviction, a dissenting juror should consider whether his doubt is reasonable when it has made no impression upon the minds of the other jurors, equally honest and equally intelligent. If, on the other hand, the majority of the jury is for an acquittal, a minority should ask themselves whether they might not reasonably doubt the correctness of their judgment, which is not shared by the majority of their fellow jurors. A jury verdict must be a unanimous verdict of all of you, but it must also be the verdict of each of you.

And I make these suggestions at this time, and we'll give you some more time to see whether or not you can reconcile your differences and see if you can arrive at a unanimous verdict without yielding the conscientious conviction of your own. If you'd retire to the jury room, we'll give it another try for a while. You may now return to the jury room.

After the jury had again retired to deliberate, the judge advised counsel that he would call the jury back at 9:37 p.m., saying "[t]hat will be six hours and if they can't arrive at a

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verdict in six hours, I don't think they ever will." At 9:37 p.m., the judge did call the jury back, whereupon the following discussion took place:

> THE COURT: Ladies and Gentlemen of the Jury, do you believe that you can arrive at a verdict in a short period of time?
>
> JUROR: I believe we're closer to it than we were. I have that idea.
>
> THE COURT: If I give you another 20 minutes, will that be enough? You want to give it a try for 20 minutes?
>
> JUROR: All right.
>
> THE COURT: All right. We'll give you another 20 minutes and see if you can arrive at a verdict within the next 20 minutes. You can retire to the jury room.

Seventeen minutes later the jury returned with a unanimous verdict, finding Bryan guilty of the lesser included offense of manslaughter.

In exhausting his state remedies, petitioner's argument that the above procedure was impermissibly coercive met with mixed acceptance but ultimate failure. On direct appeal, the Florida First District Court of Appeal reversed the conviction and remanded the case for a new trial because of the giving of the *Allen* charge. Bryan v. State, 280 So.2d 25 (Fla.App.1973). Two members of the three-judge appellate panel stated that, while the *Allen* charge was not impermissible per se, in this case the charge, coupled with the subsequent instruction setting a twenty minute period for deliberation, constituted prejudicial error. 280 So.2d at 28. Granting a writ of certiorari, the Florida Supreme Court re-

instated the verdict and judgment of the trial court. In a 5-2 decision, the court found that neither the *Allen* charge nor the twenty minute instruction constituted prejudicial error. State v. Bryan, 290 So.2d 482 (Fla.1974).

The federal district court, however, reviewing the same record that was before the state court, decided that under the totality of the circumstances surrounding the eventual guilty verdict in this case a "coercive atmosphere was created in which the jury was forced to deliberate to verdict." The court concluded that this coercive effect acted to deprive petitioner of his constitutional rights of due process under the Fifth and Fourteenth Amendments. Bryan v. Wainwright, 377 F. Supp. 766, 769 (M.D.Fla.1974). The cases relied on by the district court and cited in its opinion, 377 F.Supp. at 769-770, were direct appeals in which the coercive effects of the facts did not have to rise to the constitutional level of deprivation of due process to merit relief.

A federal writ of habeas corpus is available to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a).

[1] The United States Supreme Court has never receded from its approval of the supplemental charge given in Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). Although many courts have criticized or discarded the *Allen* charge, we have not been referred to nor found any cases which have based the decision on federal constitutional grounds. This Court has recently once again approved the use of the *Allen* charge, United States v. Bailey, 480 F.2d 518 (5th Cir. 1973) (en banc), but even those courts which no longer approve the *Allen* charge have based their decisions on the general supervisory power of the reviewing court.

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See, e. g., United States v. Thomas, 146 U.S.App.D.C. 101, 449 F.2d 1177 (1971) (en banc); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837, 90 S.Ct. 97, 24 L.Ed.2d 88 (1969); Winters v. United States, 317 A.2d 530 (D.C.Ct.App.1974); People v. Sullivan, 392 Mich. 324, 220 N.W.2d 441 (1974), each of which cites many additional cases concerning the *Allen* charge. It is, therefore, left to each state to make its own decision as to the usefulness of this type of instruction.

[2] The point for decision in this case then is whether the subsequent colloquy between the state trial judge and the jury which resulted in an additional twenty minute period for deliberation raised the approved impact of the *Allen* charge to unconstitutional coercion.

It is now well settled that "[u]nless there is a clear showing that the errors complained of were so gross or the trial was so fundamentally unfair, habeas corpus will not lie to set aside a conviction on the basis of improper instructions." Young v. Alabama, 443 F.2d 854, 855 (5th Cir. 1971), cert. denied, 405 U.S. 976, 92 S.Ct. 1202, 31 L.Ed.2d 251 (1972); *accord*, Pleas v. Wainwright, 441 F.2d 56 (5th Cir. 1971).

Viewed in the totality of circumstances, we think the district judge erred in deciding from the state record that the jury was necessarily coerced to the point of constitutional prejudice to the defendant. *Cf.* Basker v. Crouse, 426 F.2d 531 (10th Cir. 1970); Connor v. Deramus, 374 F.Supp. 504 (M.D.Pa.1974). Having decided that the comment of the judge was not so prejudicial as to make the trial fundamentally unfair it becomes unnecessary to revisit the results reached in United States v. Amaya, 509 F.2d 8, 5 Cir. 1975, and Thaggard v. United States, 5 Cir. 1965, 354 F.2d 735, cert. denied, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301

(1966), in the exercise of our supervisory power over proceedings in federal courts. The petition for writ of habeas corpus should have been denied.

Reversed.

BLEED THROUGH

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 74-3179

D. C. Docket No. CA-74-322-T-J

WILLIAM MICHAEL BRYAN
Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT, Director, Division of Corrections,
Respondent-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before GOLDBERG and RONEY, Circuit Judges, and LYNNE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed.

April 16, 1975

Issued as Mandate:

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